



**MINUTES
FREMONT PLANNING COMMISSION
REGULAR MEETING OF SEPTEMBER 25, 2003**

CALL TO ORDER: Chairperson Cohen called the meeting to order at 7:00 p.m.

PRESENT: Chairperson Cohen, Commissioners Weaver, Wieckowski, Harrison, Thomas, Sharma, Natarajan

ABSENT: Weaver (Arrived 8:20 p.m.)
Wieckowski (Left 9:30 p.m.)

STAFF PRESENT: Jeff Schwob, Interim Planning Director
Larissa Seto, Senior Deputy City Attorney II
Barbara Meerjans, Associate Planner
Momoko Ishijima, Planner I
Jake Lavin, Project Manager
Chief MacDonald, Fremont Fire Department
René Dalton, Associate Transportation Engineer
Alice Malotte, Recording Clerk
Chavez Company, Remote Stenocaptioning
Walter Garcia, Video Technician

APPROVAL OF MINUTES: Regular Minutes of August 28, 2003 and September 11, 2003 were approved as submitted.

CONSENT CALENDAR

THE CONSENT LIST CONSISTED OF ITEM NUMBERS 1, 2, 4, 5, AND 6.

IT WAS MOVED (HARRISON/THOMAS) AND UNANIMOUSLY CARRIED BY ALL PRESENT THAT THE PLANNING COMMISSION TAKE THE FOLLOWING ACTIONS ON ITEM NUMBERS 1, 2, 4, 5, AND 6.

ITEM 1. AUTOMOTIVE DEALERSHIPS – Citywide – (PLN2003-00202) – to consider a Zoning Text Amendment for the inclusion of performance standards for automotive dealerships in areas outside of the Fremont Auto Mall. This project is exempt under the general rule in Section 15061(b)(3) of the CEQA Guidelines. (Continued from August 28, 2003.)

CONTINUE TO A DATE UNCERTAIN.

ITEM 2. DEVRY STUDENT DORM – Ardentech Court – (PLN2003-00309) - to consider a Planned District Major Amendment for a new 83,996-square foot student dormitory located at Ardentech Court (adjacent to DeVry College Campus at 6600 Dumbarton Circle) in the Northern Plain Planning Area. A Mitigated Negative Declaration has been prepared for this project. (Continued from August 28, 2003.)

CONTINUE TO OCTOBER 9, 2003.

- ITEM 4. NILES GROVE – 35601 Niles Boulevard – (PLN2003-00287)** - to consider a Zoning Administrator referral of a Zoning Administrator Permit to allow the development of three detached single-family (Dwelling Group) dwellings in the Niles Planning Area. This project is categorically exempt for CEQA under Section 15303 as it relates to the construction and conversion of up to three single-family residences.

CONTINUE TO OCTOBER 9, 2003.

- ITEM 5. FREMONT HUB – 39170 Argonaut Way – (PLN2003-00315)** - to consider a finding for site plan and architectural review for modifications involving a net expansion of approximately 31,000 square feet to the Fremont Hub in the Central Business District. This project is categorically exempt from CEQA review per section 15302, Replacement and Reconstruction Class 2.

CONTINUE TO OCTOBER 9, 2003.

- ITEM 6. FIRE STATION NO. 8 – 35659 Fremont Boulevard – (PLN2004-00049)** – to consider a finding of General Plan conformity for a proposed fire station site located in the Centerville Planning Area. A Mitigated Negative Declaration has been prepared for this project.

HOLD PUBLIC HEARING;

AND

FIND THAT PLN2004-00049 IS IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S EXISTING GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN'S FUNDAMENTAL GOALS AND HEALTH AND SAFETY CHAPTERS, AS SET FORTH IN EXHIBIT A, HEREBY ADOPTED BY REFERENCE.

The motion carried by the following vote:

AYES:	6 – Cohen, Harrison, Natarajan, Sharma, Thomas, Wieckowski
NOES:	0
ABSTAIN:	0
ABSENT:	1 – Weaver
RECUSE:	0

PUBLIC COMMUNICATIONS

ORAL COMMUNICATIONS

PUBLIC HEARING ITEMS

- ITEM 3. NATURAL BRIDGES PRESCHOOL – 45013 Imnaha Court – (MIS2003-01407)** - to consider a Zoning Administrator referral of a Zoning Administrator Permit to allow for a Large Family Daycare facility in the Mission San Jose Planning Area. This project is statutorily exempt from CEQA under Section 15274, Family Day Care Homes.

MODIFICATION TO STAFF REPORT

On Page 4, Noise section, paragraph 2:

The subject site backs up to the San Francisco Water District Hetch Hetchy Water Line property. The northern side property line, approximately 30 feet in length, is adjacent to the neighbor's front yard. The neighbor to the southern side shares the full side property line. Section 8-22147.5 of the Fremont Municipal Code requires ~~that Large Family Day Care~~

facilities that the use and location of the play areas shall not cause any excessive discomfort for adjacent residents or property owners on the use of their property. (Condition 7)

Suzette Takei, applicant, stated that she had been a teacher of preschool through fifth grade for approximately 13 years. She started providing day care services in 1998 when her oldest daughter was born. In January she obtained a small day care license to provide preschool services, rather than only day care services, to a few more students. A few months ago, she bought her parents large home, which allowed for the addition of more students. When her oldest child was three years old, she had been unable to find a preschool that had the correct combination of social and academic programs. She felt that by creating this preschool, she would provide the best quality education for young children while allowing her to stay home with her three (and soon to be four) children. For her families that worked, she provided extra day care hours, along with the preschool. However, most of the children attended just the preschool, which was approximately three hours. All inspections had been performed and passed, a State license had been obtained and she had addressed the neighbors concerns, copies of which were before the Commissioners.

Commissioner Wieckowski asked if she believed that her proposal met the State standard that required normal residential surroundings that gave children an environment that was conducive to healthy and safe development. He asked if she would "provide the same home environment as provided in the traditional family home." He noted that two parking spaces had to be set aside, per City regulations, and he had seen space next to her property that could accommodate up to eight vehicles. He felt that the parking provision [Condition # 8] should be struck, because off street parking was sufficient to meet that requirement. He wondered why her proposed hours were to be 7:00 a.m. to 5:00 p.m., which seemed restrictive. He suggested that her hours be extended to 7:00 p.m.

Ms. Takei stated that she believed that her proposal would meet the Statewide requirements that he had quoted. Originally, when she started in January, she had operated on Mondays and Wednesdays, only, and provided full-time day care for one child. At this time, none of her families needed her services beyond 4:30 p.m. or prior to 7:30 a.m. However, she would be willing to change the hours to suit her families' needs. She tried to keep her afternoons open for her own family.

Jonathan Takei, husband, stated that the municipal code did not require that the two parking spaces be physically on the property, but could be available on the street.

Commissioner Natarajan asked how large the backyard was.

Ms. Takei stated that the site plan was not correct. The lot was shaped correctly, but the size shown was inaccurate. The lot measured just over 12,000 square feet with approximately 1,600 square feet available for use by the children in the backyard.

Commissioner Sharma asked if she planned to have eight to ten children on site, not counting her children, would she employ someone to help who would need a parking space nearby. Had she planned parking for someone who might bring their child for only an hour or so or for having more than the one aide?

Ms. Takei replied that if she had more than eight children, she needed an extra person at all times. She did not foresee bringing in someone else to provide other services. Of the fourteen children that her license allowed, two of the children had to be over six years old, none of the children could be under two years old, and her children counted as part of the total. She planned to have nine children to a class with two teachers.

Chairperson Cohen asked what the ratio of teachers to children was.

Ms. Takei replied that the State mandated a one to twelve ratio for home centered preschools, which did not apply to her, because she was operating under a day care license.

Chairperson Cohen opened the public hearing.

Susan Hamilton, the applicant's mother, stated that she did not understand the neighbors' fears about strangers coming into the neighborhood, as there were houses on the street where rooms and flats were rented. No one had expressed concern about those strangers being in the neighborhood. Another comment concerned the neighborhood children not being able to safely play in front of their homes, because of more traffic on the street that would be caused by the preschool. She knew of children from just two homes who played in front of their homes. She did not believe that any of the preschool parents would drive down the street at an unsafe speed.

Robin Hunter, Francisco Juarez, Brandi Geer, Jason Pita, Tabitha Chaudhury, Valerie Chernoff, Yin Yin Mar, Joseph Baer, Dr. Donald Grushkin, Terry Sherbecoe and Donald Hamilton, the applicant's father, all spoke in support of Ms. Takei's preschool. Ms. Mar operated a small preschool that was similar to Ms. Takei's. Mr. Baer and Mr. Grushkin were deaf and stated, through a sign language interpreter, that Ms. Takei knew sign language, which they felt was important for their children's development.

Commissioner Sharma asked how far each speaker lived from the school and what were the traffic conditions at the time they dropped off their children. He asked some of the speakers how they had found this facility and how it compared to others in the area. If this facility was in the speakers' neighborhoods, would they support its expansion as a neighbor?

Commissioner Harrison asked how long their vehicles were parked in front of Ms. Takei's house while dropping off and picking up their children. He asked if Ms. Mar had received negative comments from her neighbors.

Commissioner Wieckowski asked Ms. Mar if she had visited Ms. Takei's home and if she believed that the environment was similar to a traditional home.

The speakers lived in various areas, including Newark and Pleasant Hill, and most took about five minutes dropping off and picking up their children. Traffic on the street was very light. None of the area programs provided the right blend of academic and social programs, except for Ms. Takei's preschool. Many were co-ops with many parents in attendance, who tended to take care of their own children first. The large lot provided every physical need for the preschoolers. The children had access to other rooms in the home and were not confined to one room, as was normal in large preschool/day care centers. Ms. Mar had not received any negative comments from her neighbors concerning her preschool. As long as the preschool communicated with its neighbors, Mr. Baer would certainly support such a facility in his neighborhood. All the children "loved" going to Ms. Takei's preschool. Mr. Hamilton believed that when families with younger children moved into the neighborhood in the future, those children would attend this preschool.

L.P. Lakshmipathy, neighbor, stated that he disagreed with the idea that two cars per hour could be expected to use the street while traveling to and from the preschool. This facility would cause increased traffic. His main concern was that the children this facility handled could increase in the future, which would further increase the traffic. He questioned the traffic study and wondered how a small cul-de-sac could handle 800 vehicles a day.

Commissioner Sharma asked if he agreed with fourteen children at the most, with no increase in the future.

Mr. Lakshmipathy replied that he approved of the eight children that Ms. Takei now had coming to her house. Fourteen children was equal to a larger commercial establishment and would negatively impact the neighborhood.

Commissioner Harrison asked if this zoning would run with the land or run with the applicant.

Interim Director Schwob stated that this type of permit would run with the land.

Planner Ishijima believed that the permit was not transferable.

Commissioner Thomas asked staff to research State and City requirements and explain the difference to the public.

Interim Director Schwob answered that State law regulated how and when cities could regulate day care. Eight or fewer children were exempt from city regulation and up to fourteen children (Large Family Day Care) required a zoning administrator permit from the City. Some zones in the City allowed no upper limit of children but were subject to a Conditional Use Permit review.

Commissioner Natarajan asked if there had been a zoning administrator hearing.

Interim Director Schwob replied that there was no hearing. This item was referred to the Commission based upon the concerns expressed by the neighborhood.

Planner Ishijima stated that the Large Family Day Care Ordinance did not allow the permit to be transferable.

Gayathri Lakshmipathy, neighbor and wife of former speaker, stated that she had become the spokesperson for the neighborhood, because many of the neighbors spoke little English. They did not object to the eight children the applicant already had. In fact, they had asked her to not increase the number of children and keep the preschool to eight. She asked why the applicant could not have children coming to her home at various times of day, always equaling fourteen and what would stop the applicant from offering staggered sessions with fourteen children in each session around the clock. The applicant had stated that she might operate more than one session in the future. She stated that a childcare center near the elementary school was already serving the neighborhood. Once parents dropped their children off at the preschool, she believed that they would no longer be as careful when leaving the court as when they were driving with their children, and they would present a danger to the neighborhood. She claimed the neighborhood was never informed of the applicant's plans, which concerned them. She asked that the neighborhood be allowed to stay the same and that this "commercial thing where people come and go" not be approved.

Chairperson Cohen asked, at present, if there was evidence that the sessions had been staggered, "with eight and eight and eight," as she was worried about.

Ms. Lakshmipathy stated that she was a working parent and had no knowledge of how many sessions might be taking place. If the classes were kept to eight, the preschool would not affect the neighborhood.

Commissioner Sharma asked to see the hands of the neighbors who were attending and objected to this permit. He asked if the speaker saw no problem at this time, but predicted that there would be a problem if the children were allowed to total fourteen. He wondered if the applicant had not perceived that the neighborhood would object to her taking in more children and, consequently, had not understood the need to communicate her plans. He

asked what would be the norm for a parent who wished to drop their child off at a day care facility. Would the child be left for a few hours, at least, or would the child be left for an hour?

Ms. Lakshmi stated that one neighbor was in attendance and that she had given the City a petition that had been signed by all of the other neighbors who did not approve of the permit. She replied that she would expect that a babysitter would be hired, if people wished to go out for lunch or dinner for an hour or two. In her opinion, the applicant should rent another location for "her commercial facility" rather than locating it in her home at the end of a cul-de-sac.

Chairperson Cohen called for a recess at 8:30 p.m.

Chairperson Cohen called the meeting back to order at 8:40 p.m.

Ms. Takei closed by addressing the questions brought up by the neighbors. State law did not allow the children to ever play in the front yard. The families whose children attend her classes missed the elementary school traffic on Grimmer Boulevard, because her hours were different from the hours of elementary school. She believed that some of the neighborhood families would eventually use her program as space became available and as their children became of age, because three families who lived on the street had approached her about her program. However, she was full and could not take any more children. She emphasized that she had met all of the State's requirements and had obtained the State Large Day Care License; she only lacked the permit from the City. Because of the ages of her children, she was allowed to enroll only three other children under the guidelines for eight or less children. When her baby was born, she would be allowed to have only two outside children, which was why she had applied for the Large Family Day Care license. She expected to have eight children, besides her children, at her home. The previous speaker was correct when she voiced concern about multiple groups of children, never totaling more than fourteen, and attending multiple preschool sessions every day. However, her program was structured from 9:00 a.m. to 12:30 p.m. with some day care for those who needed it. She had planned to start her preschool sessions in September, but when it did not happen, she felt obligated to provide services for families who had signed up to begin in September. Consequently, at this time, she was providing sessions in both the morning and afternoon. She planned to move the Monday and Wednesday afternoon children to the mornings. The children who came from working families attended on Tuesday and Thursdays and were picked up at approximately 4 o'clock in the afternoon. Many people in the neighborhood had been notified of her plans for a preschool a few days after her family's move to the home. She had not heard anything from the neighbors and, because she knew many of them from when she was growing up there and because her parents knew many neighbors, she had not anticipated any concerns. She acknowledged that she and some of the "neighbors started out on the wrong foot." Once she heard of the petition, she talked to as many families as possible and held the open house.

Commissioner Sharma thanked the applicant for clarifying how she managed to have so many parents speaking on her behalf.

Commissioner Wieckowski asked if the garage requirement was a State requirement. He wondered how she would store the preschool tools and toys, if she could store them in the garage.

Ms. Takei replied that it was a Fire Marshall requirement. She was allowed to store her school materials in the garage as long as two vehicles could fit in at all times. She used a shed in the back yard where she stored the outside toys.

Commissioner Natarajan asked if the applicant would consider a condition that limited the total of students to fourteen a day.

Ms. Takei stated that she would rather not, because of her three extra students who came on Tuesday and Thursday afternoons to fill out her classes. She may want to operate a Monday, Wednesday, Friday class in the future.

Chairperson Cohen closed the public hearing.

Chairperson Cohen asked if the Commission was limited in its discretion based upon Safety Code 1597.46 as long as the applicant met the basic requirements.

Senior Deputy Attorney Seto stated that he was correct. The City was allowed to regulate standards based on spacing between the Large Family Day Care sites, concentration of traffic, parking and noise.

Commissioner Natarajan asked about Condition 3 regarding hours of operation and if a child could stay past 5:00 p.m. and not violate the condition. She asked how Conditions 6 and 7, regarding facility noise levels, were defined and how would they be monitored. Where was the play area in the backyard in relation to the neighbors' properties?

Interim Director Schwob stated that she was correct about the hours of operation. It was purposely written that way, because, occasionally, parents were detained or needed to pick up their child later. Monitoring would be done on a complaint basis and a noise meter could be used to measure noise levels.

Planner Ishijima replied that she had not seen the backyard.

Commissioner Harrison asked how many complaints had the City received regarding similar day care facilities.

Interim Director Schwob stated that, to his knowledge, there had been no code enforcement cases relating to Large Family Day Care within the last five years.

Commissioner Sharma read Condition No. 2, which required that the owner live on the property, asked if it was to keep the structure from being used for a large day care facility.

Interim Director Schwob stated that the intension was to prevent someone from buying a residential property solely to operate a Large Family Day Care Center. However, more children than fourteen would not be allowed within this zone.

Commissioner Wieckowski believed that the use was consistent with the General Plan and the off street parking was sufficient to meet the requirements of Planning and Zoning Section 8.22147-5B1 and he suggested that Condition 8 and 9 be deleted. Was there anything in State law that affected a change?

Senior Deputy City Attorney Seto replied that State law deferred to local agencies for judgment.

Commissioner Natarajan noted that the neighborhood lots were large enough that they could be subdivided, which would allow for more houses and more people and traffic than would be generated by parents dropping their children off at the preschool. She believed that the large size of the yard made noise generated by the children playing in the back a moot point. This was a unique lot with plenty of on street parking available adjacent to the cul-de-sac, so parking did not seem to be an issue. She expected that the applicant would work with the neighbors concerning the whole idea of staggering the children in morning and afternoon classes. If the neighbors had specific concerns regarding this issue, they could bring it back to the Zoning Administrator. She would support staff's recommendation.

Commissioner Sharma believed that traffic was not an issue for which to deny the project. From his experience, he did not believe a parent would become a speeder along the 100 yards of street after dropping off his child. He acknowledged that everyone felt anxiety because of the unknown. He recalled, as an example, when affordable housing was proposed in the Mission area. Many people were against it, because it was something new in the neighborhood, as this facility was. However, the affordable housing was a wonderful project and nothing had changed. A home environment was usually better for small children than a large day care facility, if the teacher was good. He also reminded the neighbors that the City would help them out if they had any problems in the future. It was a good project and it was appropriate for the neighborhood. He encouraged both parties to communicate with each other to work out any issues before they became problems. He would support the project.

Commissioner Thomas stated that the issue of bringing strangers into the neighborhood was brought up in many of the letters, but was not brought up by the neighborhood spokesperson. However, she wondered about the yard maintenance people and housekeepers who worked inside and outside of the neighbors' homes. They were never seen, because they arrived when the owners were not at home. She believed that this was a strong exaggeration concerning the idea of bringing small children into the neighborhood to attend a preschool. She did not expect that there would be any more noise than in any other neighborhood in the City. She recalled a large Kindercare Center opening in her neighborhood, which engendered many complaints. By the time it opened, there were only four openings left. The demand was still there. In her neighborhood, the property values had increased, because people knew a good, professional facility was nearby. She was pleased that the applicant was bilingual and could provide a service to the deaf community, also, which "was an excellent, excellent recommendation."

Commissioner Harrison would support the project. He stated that he sat on a board for a not for profit childcare agency that operated in four counties and he knew that quality childcare was badly needed. Judging by the applicant's many supporters, he supposed that "you are giving them chocolate chip cookies" in the mornings. He also encouraged the applicant to work with the neighbors so that the City's record of no complaints was not broken.

Commissioner Wieckowski thanked the applicant for bringing her day care facility to the City, along with Yin Yin Mar and all of the others who took care of working parents' children. The State of California prohibited the City from doing anything that would restrict large day care centers in a family neighborhood. This applicant had met all of the State's requirements. Her education and skills were wonderful and he expected that she would be very successful. He found that the on street parking met Section 8.221475(b) and (1) for off street parking, which would allow the deletion of the corresponding conditions.

Vice Chairperson Weaver stated that she would abstain from voting, as she had not been present for all of the presentation and comments.

IT WAS MOVED (WIECKOWSKI/THOMAS) AND CARRIED BY THE FOLLOWING VOTE (6-0-0-1-0) THAT THE PLANNING COMMISSION HOLD PUBLIC HEARING;

AND

FIND MIS2003-01407 IS STATUTORILY EXEMPT FROM CEQA PER SECTION 15274;

AND

FIND MIS2003-01407 IS IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S EXISTING GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN'S FUNDAMENTAL GOALS AND LAND USE CHAPTERS AS ENUMERATED WITHIN THE STAFF REPORT;

AND
APPROVE MIS2003-01407, AS SHOWN ON EXHIBIT "A", SUBJECT TO FINDINGS AND CONDITIONS ON EXHIBIT "B" EXCEPTING THAT CONDITION 3 SHALL BE MODIFIED TO READ "THE HOURS OF OPERATION WOULD BE GENERALLY LIMITED FROM 7:00 A.M. TO APPROXIMATELY 6:00 P.M.";

AND
THE PLANNING COMMISSION FINDS THAT ON-STREET PARKING IN THIS PARTICULAR CIRCUMSTANCE FULFILLS THE REQUIREMENTS FOR PARKING.

The motion carried by the following vote:

AYES: 6 – Cohen, Harrison, Natarajan, Sharma, Thomas, Wieckowski
NOES: 0
ABSTAIN: 1 – Weaver
ABSENT: 0
RECUSE: 0

- ITEM 7. BIG BOX RETAIL WITH GROCERY – Citywide – (PLN2004-00060)** – to consider a Zoning Text Amendment to limit the amount of non-taxable merchandise that may be sold at retail stores greater than 135,000 square feet in floor area. This project is exempt under the general rule for legislative actions, CEQA Guidelines Section 15061(b)(3).

ADDENDUM TO STAFF REPORT

Correction: The Executive Summary contains a typographical error. The second sentence should read "The proposed ordinance would apply to: (i) stores of 135,000 gross square feet, or greater ..."

Additional Information: The following is additional information related to actions taken by other California cities and counties regarding this issue:

City /County	Big Box Size (In Square Feet)	Treatment of Membership Stores	Manner to Limit Non- Taxable Items	Exemption for Existing Stores
City of Oakland {On 9/17/03, the Oakland Planning Commission voted 6-0 to recommend adoption of the ordinance}	100,00	Exempt	No more than 10% of sales floor area for non-taxable items	No

Commissioner Harrison disclosed that he had met with the 870 Union twice and with agents of Wal*Mart once.

Senior Deputy City Attorney Seto clarified that staff was recommending that the ordinance should apply to stores of 135,000 square feet or larger. She had not included all of the comments made by Judy Davidoff and Mark Wolfe in the staff report and stated that Judy Davidoff and her client were not in favor of the ordinance.

Chairperson Cohen asked if there was a legal reason for setting the threshold at 135,000 square feet rather than setting it at 90,000 square feet with 2 or 3 percent for non-taxable merchandise. He felt that 135,000 square feet was too large. He asked if staff favored one approach over the other. He worried that it might seem discriminatory if one store's SKUs

were measured using one method and another store's square footage was measured using the other method.

Senior Deputy City Attorney Seto stated that there was no legal threshold. It was felt that 135,000 was a good number, given the size of the community. One staff member had experienced attempting to measure the square footage of selling space for specific types of uses where every shelf was five shelves high and half the items were one type and half were the prohibited type, which had led to both approaches being recommended by staff. City Council believed that most shelves would contain similar items and measuring would be easiest. With both options available, enforcement could be done using either method. The recommendation was the lesser of either the 20,000 SKUs or 10 percent of the sales floor area for non-taxable goods. No city that had proposed or adopted such an ordinance used this approach. With computer systems, the limit of particular SKUs was reasonable. However, some retailers might not be able to provide that kind of information from their computers, so measuring the sales floor area could be performed, which had been used in other cities. She had no knowledge of either method being legally challenged. There was no legal reason for the recommended 10 percent of the sales floor for non-taxable items.

Commissioner Sharma asked how the 135,000 square foot number was chosen, as it seemed that Home Depot was 131,000 square feet and Target was 128,000 square feet. He suggested using a percentage of the gross sales rather than the two methods proposed by staff.

Senior Deputy City Attorney Seto replied that those examples were provided to give the reader an idea of what a certain size really was.

Commissioner Wieckowski asked if there were local regulations that set a minimum membership fee or what defined a membership.

Senior Deputy City Attorney Seto stated that staff had based its figures on the International Traffic Engineers (ITE) information concerning the traffic generated. The membership stores, which generally sold items in bulk, generated traffic different from a regular, super discount store. "There was no local requirement that a membership had to be 'X' number of dollars."

Commissioner Wieckowski stated that he needed to leave to catch a flight from San Francisco, so he made his comments based upon the staff report. He was inclined to approve the smaller square footage, such as 90,000 square feet, which was more than sufficient. The 10 percent was too high and he suggested that 3 or 4 percent was more appropriate for the community.

Commissioner Thomas asked how Smart & Final and Fry's Electronics compared with the listing in the staff report and what was the difference between a club and a store that charged a membership fee.

Interim Director Schwob guessed that Fry's Electronics was approximately 120,000 to 130,000 square feet with Smart & Final being 30,000 to 40,000 square feet.

Senior Deputy City Attorney Seto stated that the definitions of clubs and stores with membership fees came from the ITE manual. She promised to do some research and agreed that the language could be changed, if necessary, to reflect the information that was found.

Chairperson Cohen opened the public hearing.

Noe Nothf read two letters from the Transportation and Land Use Coalition and the Greenbelt Alliance, which stated, in essence, that they supported the proposed ordinance

because: Auto dependency and urban sprawl would be discouraged; walkable neighborhood centers would be reinforced as local focal points; air quality and traffic congestion would be reduced; and local downtown and existing businesses would not be threatened.

Cynthia Lin, speaking on behalf of Wal*Mart, believed the ordinance clearly and blatantly targeted her company and similar retail stores. The consumer should have the right to choose where he wished to shop and no group should dictate where or where not the consumer could shop and what merchandise was carried by the store. The UFCW was pushing this ordinance for fear of competition in the grocery arena. Consumers and merchants benefited from competition. This ordinance would remove the choice from consumers.

Commissioner Sharma asked what the difference was between homeowners associations that regulated the homes within their area and this amendment that would regulate large stores.

Ms. Lin replied that he was not making an apples to apples comparison. She gave an example of a homeowners association restricting the amount of fruit a homeowner was allowed to keep in his refrigerator or the amount of toys versus books that were allowed in an individual home.

Chairperson Cohen stated that Wal*Mart had an agenda, which was to dominate a market, and he admitted that "was not a bad thing". Her allusion to the union was not true. It wanted to protect its members. Wal*Mart had a history of going into rural towns and devastating the downtowns, although he acknowledged that it did not happen all the time. When that happened, consumers no longer had a choice.

Ms. Lin acknowledged that Wal*Mart wanted to open a store in the City of Fremont. The merchandise that was carried depended upon what customers asked for and wanted. By restricting what stores could or could not carry, the City would limit a company's ability to serve its customers. She disagreed that Wal*Mart negatively affected communities in which they were located. She stated that many communities felt a positive impact across the country, which was attested to in hundreds of articles written by reporters.

Vice Chairperson Weaver asked if there was a difference in the amount of sales tax that was gathered from non-grocery items and grocery items and if food items did not generate sales tax.

Ms. Lin responded that grocery items were non-taxable. The usual perception was that stores dedicated to groceries generated less sales tax revenue. However, that was not the case, because the groceries brought customers into the store, which increased general merchandise sales.

John Farrow, representing UFCW-870, stated that the union supported the ordinance. California communities across the state were looking at restrictions for the big, super centers now coming into the state. The key environmental issues were traffic and air pollution. Fiscal impacts were substantial. He stated that the Orange County Business Council found that there was approximately a nine-dollar per hour wage difference between super center employees and the workers that were displaced from supermarkets, which caused a loss of spending power. The majority of super center employees had no health insurance benefits, the costs of which were born by local taxpayers. As anchor tenants (such as supermarkets) failed, smaller businesses lost business and shopping centers became blighted. Super centers isolated retail away from neighborhoods, competed with neighborhood businesses, and encouraged automobile use. He saw no offsetting benefits. He would support reducing the threshold to 100,000 square feet and the square footage to 5 percent.

Judy Davidoff, representing Wal*Mart, stated that her client opposed this ordinance, regardless of the size. Only three such ordinances had been approved within the State of California and some cities (such as the City of Tracy) did not support such an ordinance. Increased traffic was not an appropriate rationale. Traffic impacts must be mitigated. She disputed that a large retail store created more traffic than a large membership club. What difference in traffic would there be between two nearby 75,000 square foot retail stores and one large retail store under one roof? She suspected this ordinance was meant to affect a store that had been recently approved by the City.

Chairperson Cohen recalled that a statement had been made by Wal*Mart that the approved super store did not intend to sell groceries. He asked if that was no longer Wal*Mart's position.

Ms. Davidoff answered that a super center, with a full-line grocery store, was not intended for this store at this location.

Chairperson Cohen asked if Wal*Mart intended to open a second store within the City. He asked if the speaker was aware of any legal challenge to the Martinez ordinance. He asked her opinion of the proposed language to be used in the ordinance. He asked if traffic issues, relating to the health and welfare of the community, could be used as a rationale for passing such an ordinance and if the general police power could be used to regulate the use of land.

Ms. Davidoff stated that Wal*Mart was always looking at opportunities for other stores. The 880 corridor was a very good market. She knew of no legal challenges to any of the ordinances. In her opinion, the language used across the board for the ordinances was legally defective, because of equal protection issues, discrimination toward a particular retailer and due process issues, along with many others. The use of police power had to have some rational basis and there was no evidence in the record to establish that.

Vice Chairperson Weaver asked why the speaker believed that this ordinance would have an impact on the City Council's approval for Wal*Mart, if a super Wal*Mart was not planned.

Ms. Davidoff replied that three different sizes of the same brand SKU counted as three different SKUs and added up quickly, which could affect the proposed new store.

Commissioner Sharma asked why should this City wait to be the last one to impose such an ordinance rather than one of the first. Her argument that few cities in California had approved a similar ordinance, so the City of Fremont should not have one "did not fly" with him.

Ms. Davidoff stated that it was the City's prerogative to make that decision.

Commissioner Harrison asked how many SKU items were in the Union City and Milpitas stores and if it were possible to obtain a total that could be passed onto the Commission. He could understand how SKUs could add up quickly.

Ms. Davidoff stated that she had no definitive answer.

Commissioner Thomas noted that snack items were already sold within Wal*Mart, which would add to the food items. How many SKUs or the percentage of snack items, compared to pharmacy over-the-counter items were generally available in Wal*Mart.

Ms. Davidoff did not know the answer.

Chairperson Cohen closed the public hearing and complimented both Wal*Mart representatives for "holding your own."

Senior Deputy City Attorney Seto responded that the Arroyo Grande ordinance was adopted in January 2001 and the Martinez ordinance was adopted in September 2002. She noted that the table on the top of page 3 of the staff report should read “(b) 10% of gross retail floor area for non-taxable goods.” Exhibit A was worded correctly.

Commissioner Harrison asked if, theoretically, this ordinance would permit Fry’s electronic store to become a Fry’s grocery store, as the electronic store was approximately the size that would be limited under this ordinance. He wondered what would happen down the road, if this ordinance was adopted and the state started taxing food.

Senior Deputy City Attorney Seto stated that Fry’s would be subject to this ordinance if the store was over 135,000 square feet.

Interim Director Schwob stated that a grocery tax would cause a review of the ordinance.

Commissioner Natarajan asked where it stated in the staff report that the rationale for creating this ordinance was based upon traffic concerns. It seemed to her that the primary focus was to preserve existing neighborhoods that were served by existing commercial areas.

Senior Deputy City Attorney Seto replied that that preserving neighborhood stores was one issue. Another issue raised in the Council’s referral was traffic concerns. The traffic analysis footnote on page 3 was the basis for treating a membership store differently, because the traffic for a membership store was different.

Commissioner Sharma suggested, again, that 5 percent of the gross sales should be used as a measurement, as it would be easier to implement.

Commissioner Natarajan asked if page 4 discussed his suggestion.

Senior Deputy City Attorney Seto agreed that it was the same discussion. Concerns were expressed about stores that sold seasonal edible items (such a Halloween candy) and would provide an inaccurate percentage. However, the Commission could recommend using a percentage of the gross sales to Council.

Chairperson Cohen asked how the Commission felt about the main issues of square footage, the percentage of floor area, and whether to exclude membership clubs.

Commissioner Harrison was leery of decreasing floor area percentage without knowing how the business worked and how it would affect a store’s business. He agreed with Councilmember Wasserman’s referral that spoke of protecting the neighborhood grocery stores. He would approve limiting the square footage of the selling floor. It was difficult to envision the huge square footages that were being discussed. He understood that the Martinez percentage was written as an anti-Costco ordinance and he was not willing to eliminate certain stores.

Chairperson Cohen stated that it was conceivable that other large retailers might turn into the same concept that Wal*Mart had done so well. He asked if the Commission felt that this item should be continued to allow time for more answers or should it be recommended to City Council, as they would have the final approval.

Commissioner Harrison asked what precluded a store/club from giving away memberships or charging one cent for a membership. Was Safeway a membership club because one used their card? He wondered about obtaining total SKUs from any large retail store. If it could not be obtained at this time, what made anyone think they could get it down the road when acting as a policeman. He believed that the Commission should pass a recommendation to

the City Council and let them decide on staff's recommendations, along with comments from the Commissioners.

Senior Deputy City Attorney Seto stated that this item was scheduled to be heard by City Council on October 14th.

Commissioner Natarajan agreed with Commissioner Harrison regarding the total floor area and the SKUs. However, the definition of a big box should be firm. She would support 90,000 square feet. She questioned that membership should be exempted. Conceivably, Costco and Sam's Club could spring up on every street corner, and she asked if this is what the City wanted. She probably would go with the lowest percentage number, but additional information was needed before making that decision.

Commissioner Sharma agreed with 5 percent and 90,000 to 100,00 square feet. Membership stores were not an issue for the City at this time. If they became an issue in the future, it could be addressed at that time.

Commissioner Thomas stated that she was playing devil's advocate and recalled that when she first became a Commission member, competition was not within the Commission's purview. With that in mind, she needed more information before making a decision. Membership stores should not be exempted. Information concerning the size of stores in neighboring communities would help. Local businesses should be asked to clarify "the SKU issue" so that it could be better understood. She was not ready to make a decision.

Chairperson Cohen asked if the City Attorney could respond to some of her concerns about economic impacts on existing stores relating to land use issues.

Senior Deputy City Attorney Seto stated that Cities could look at economic impact from retail uses. Specific retailers could not be singled out as retailers that the City did not want. However, this ordinance was drafted in such a way that specific retailers were not named and it was appropriate to set up criteria.

Vice Chairperson Weaver would prefer the lower end of the scale be considered for all three of the issues. Did the City want to fill up the small spaces left within the City with any big box retail? All big box retail stores were car-driven and caused the same traffic and air pollution. She did not know if the draw for a big box retail was the non-taxable grocery items or the taxable items. She was not sure that she wanted to make a choice between air quality and sales tax revenue. Sometimes, one gave up revenue so that air quality and life in the City was better. She wished that "Council Member Wasserman's conversion had come before Wal*Mart rather than after."

Chairperson Cohen acknowledged that Council Member Wasserman's referral was an important issue. He agreed that information pertaining to this item was not clear enough to recommend to the City Council. He did not believe that traffic should be the only rationale. Competition was an issue and how it affected the health, safety and welfare of the community. He worried that the creation of large stores could overwhelm the other smaller retailers in the City and negatively impact the surrounding commercial centers. Studies were out there that would help to develop a body of information that would allow the City to make findings that would support the ordinance. The issues raised by the representatives of Wal*Mart also needed to be addressed. He wanted more information

Vice Chairperson Weaver asked for information regarding SKUs and other non-taxable items. It seemed that it would be relatively simple to separate out the type of item, such as grocery store items or lotions, that might be appropriate for a store to carry and were non-taxable.

Chairperson Cohen added that it was perfectly acceptable for the City to create an ordinance as was being debated at this hearing.

Commissioner Harrison asked for building square footage and SKU information concerning the Target store at The Hub, along with Union City and Newark Wal*Mart stores, which were not super centers with full grocery stores. He believed that if membership clubs were not exempted, "say goodbye to Costco."

Senior Deputy City Attorney Seto suggested continuing to a date uncertain, because the requested information may not be available.

Commissioner Natarajan asked for additional information on membership clubs and how they were defined.

IT WAS MOVED (HARRISON/WEAVER) AND CARRIED BY THE FOLLOWING VOTE (6-0-0-1-0) THAT THE PLANNING COMMISSION **CONTINUE TO A DATE UNCERTAIN.**

The motion carried by the following vote:

AYES:	6 – Cohen, Harrison, Natarajan, Sharma, Thomas, Weaver
NOES:	0
ABSTAIN:	0
ABSENT:	1 – Wieckowski
RECUSE:	0

MISCELLANEOUS ITEMS

Information from Commission and Staff:

- Information from staff: Staff will report on matters of interest.

Interim Director Schwob stated that the City Clerk's office had asked how many meetings the Planning Commission might expect to have during the upcoming calendar year to allow for future cost savings. The development workload was uncertain and he believed that flexibility should be maintained.

Commissioner Thomas expressed surprise that this meeting had been held when there were just two items on the public hearing agenda. She pointed out that only one meeting, during the year, had been cancelled and it was in July, because the Commission normally met just once in August. A better effort needed to be made when only one or two items were on the agenda. She recommended that all of the second and fourth Thursday meeting dates should be set, so that all Commissioners had them on their calendars. Meetings cancelled two weeks beforehand was "just fine."

Interim Director Schwob explained that several internal procedural problems had occurred that had prevented two of the items from being heard. He noted that this meeting had lasted longer than usual with just two items on the agenda. However, the fire station had to be heard at this meeting.

Commissioner Natarajan asked if, in the future, both meetings could be cancelled in August.

Interim Director Schwob agreed that could be an option.

Commissioner Harrison agreed with scheduling all the meetings for the year, then canceling on a case-by-case basis.

Vice Chairperson Weaver would prefer canceling a date in November rather than changing the meeting dates, as had been done before.

Commissioner Thomas noted that the meeting dates were usually moved to the first and third Thursdays to accommodate the Thanksgiving holiday. Why not just cancel the fourth Thursday meeting?

- Information from Commission: Commission members may report on matters of interest.

Commissioner Sharma thanked everyone concerning the Mission Peak information. He stated that he had not had a reply to the email he mentioned at the last meeting. He asked if there was a better way to pass on an email concern rather than doing it at a meeting.

Interim Director Schwob suggested that an email could be forwarded to staff, who could forward it onto the appropriate person. He promised to follow up on the email discussed at the last meeting.

Meeting adjourned at 10:45 p.m.

SUBMITTED BY:

APPROVED BY:

Alice Malotte
Recording Clerk

JEFF SCHWOB, Secretary
Planning Commission